Quality Plating, Barnard & Burk, and Ameritemps, by and through their respective insurance carriers, ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's decision regarding J.A.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUES PRESENTED

Over the course of many years, while working for several different employers, Mr. A. suffered a series of injuries to his low back, right foot and left foot. In addition to these work injuries, Mr. A. is intellectually and emotionally challenged. He now seeks disability and medical benefits under the Utah Workers' Compensation Act.

The parties agree that Mr. A.'s physical, intellectual and emotional problems have left him permanently and totally disabled. They disagree over the specific benefits Mr. A. is entitled to receive, and their respective liabilities for those benefits. To resolve these questions, Judge La Jeunesse held an evidentiary hearing on December 17, 2002. On July 22, 2003, Judge La Jeunesse issued his decision, which can be summarized as follows:

- Transwest, the Uninsured Employers' Fund, and the Employers' Reinsurance Fund were relieved of any liability for Mr. A.'s claims.
- Quality Plating and its insurance carrier, Workers Compensation Fund (referred to jointly as "Quality"), were ordered to pay temporary total disability compensation, permanent partial disability compensation and medical expenses for low back injuries Mr. A. suffered while working for Quality on June 18, 1990.
- Barnard & Burk and its insurance carrier, National Union Fire Insurance ("Barnard"), were ordered to pay permanent partial disability compensation and medical expenses for a second low back injury that Mr. A. suffered while working for Barnard on January 21, 1991.
- American Asbestos Abatement and its insurance carrier, Workers Compensation Fund ("American"), were ordered to pay medical expenses for a third low back injury Mr. A. suffered while working for American on July 28, 1991.
- Ameritemps and its insurance carrier, Hartford Insurance ("Ameritemps"), were ordered to pay permanent total disability compensation beginning June 16, 1997, and medical expenses for a left foot injury Mr. A. suffered while working for American on June 16, 1997.

Quality, Barnard and Ameritemps now request review of Judge La Jeunesse's decision. Quality contests its liability for medical expenses. Barnard contests its liability for medical expenses and permanent partial disability compensation. Ameritemps contends it is not liable for Mr. A.'s permanent total disability compensation.

FINDINGS OF FACT

The Commission affirms and adopts Judge La Jeunesse's findings of fact. Those facts are summarized below and are also supplemented by the Appeals Board's additional findings relative to the specific issues raised in the parties' motions for review.

Working for Quality on June 18, 1990, Mr. A. injured his low back while lifting some metal plates. He received medical attention and was off work for one week. He incurred a 2 ½ % whole person impairment as a result of this back injury. Thereafter, Mr. A. submitted no other medical expenses to Quality for payment. However, in his application for hearing against Quality, filed on October 3, 2001, Mr. A. claimed additional medical expenses. Quality's answer to Mr. A.'s application reported that "(t)he last benefits provided in this matter were paid on July 6, 1990. Workers' Compensation Fund has received no other medical bills . . . ." Quality's answer then denied liability for further medical expense on the grounds such liability was barred "by the provisions of Utah Code Ann. Section 34A-2-417."

While working for Barnard on January 21, 1991, Mr. A. slipped, fell on a pipe and injured his low back. He received medical attention at the time, but did not miss any work. This injury resulted in an additional 2 ½ % permanent whole person impairment. In his application for hearing against Barnard filed on October 3, 2001, Mr. A. claimed additional medical and disability benefits for the January 1991 injury. Barnard's answer included as its "Seventh Defense" a statement that "Defendants affirmatively allege the applicant's claims are or may be barred or limited by the statutes of limitation and/or notice provisions contained in Utah Code Annotated § 34A-2 et seq., § 34A-3 et seq. and § 35-1 et seq."

On July 28, 1991, Mr. A. injured his right foot while working at American Asbestos. This injury caused a 9% permanent whole person impairment. After a lengthy period of recovery, Mr. A. was able to return to work, this time with Ameritemps.

Nine months after beginning employment with Ameritemps, Mr. A. crushed his left great toe in a work-related accident. This injury required four surgeries, over a period of 13 months. Mr. A. did not reach medical stability until February 25, 1999, and then was left with a 4% permanent whole person impairment. Mr. A. has been unable to work since the accident at Ameritemps on June 16, 1997.

In addition to Mr. A.'s work-place injuries and resulting impairments, he has a low IQ and severe deficits in memory, concentration, judgment and other mental functions. He also suffers from significant depression that constitutes a 30% whole-person impairment, 1/3 of which is attributable to the injuries and chronic pain from his work accidents..

DISCUSSION AND CONCLUSIONS OF LAW

As already noted, Quality, Barnard and Ameritemps request review of Judge La Jeunesse's decision. Their respective arguments are addressed separately below.

Quality's liability for medical expenses. The only part of Judge La Jeunesse's Order challenged by Quality is the directive that Quality pay ongoing medical expenses necessary to treat Mr. A.'s back injuries from his accident at Quality on June 18, 1990. In arguing that it has no further liability for these medical expense, Quality relies on the affirmative defense established by §

417(1) of the Act:

> (1) Except with respect to prosthetic devices, in nonpermanent total disability cases an employee's medical benefit entitlement ceases if for a period of three consecutive years the employee does not:
>
> (a) incur medical expenses reasonably related to the industrial accident; and
>
> (b) submit the medical expenses incurred to the employee's employer or insurance carrier for payment.

Quality contends that, because Mr. A. did not submit any medical expenses for payment after 1990, the "three year" provision of § 417(1) ends his right to future payments of medical expenses. In response, Mr. A. argues that Quality cannot assert § 417(1) as an affirmative defense because Quality failed to adequately raise that defense in its answer to Mr. A.'s application.

Commission Rule R602-2-1.D addresses the content requirements that apply to answers in workers' compensation proceedings:

> The employer or insurance carrier shall have 30 days following the date of the mailing of the application to file a written answer with the Commission, admitting or denying liability for the claim. The answer shall state all affirmative defenses with sufficient accuracy and detail that an applicant may be fully informed of the nature of the defense asserted. . . . (emphasis added)

The objective of Rule R602-2-1.D is to give applicants reasonable advance notice of affirmative defenses so that they can investigate the facts and prepare a response. Quality asserted §417(1) as an affirmative defense not only by citing § 417 itself, but also by stating the factual basis that supported the defense. The Appeals Board finds that Quality's answer contained "sufficient accuracy and detail" to allow Mr. A. to be "fully informed of the nature of the defense asserted," and thereby satisfied Rule R602-2-1.D's requirements

Having concluded that Quality properly raised its §417(1) defense, the Appeals Board turns to the merits of that defense. There is no evidence that Mr. A. submitted any medical expenses to Quality after 1990. Therefore, by operation of § 417(1), Quality's obligation to pay for medical treatment related to Mr. A.'s accident of June 18, 1990, has now ended. Judge La Jeunesse's order will be modified accordingly.

Barnard's liability for medical and disability benefits. Judge La Jeunesse ordered Barnard to pay permanent partial disability compensation and medical expenses arising from the back injury Mr. A. suffered at Barnard on January 21, 1991. Barnard challenges Judge La Jeunesse's Order on the grounds that Mr. A.'s claim for medical expenses is barred by §417(1), and his claim for permanent partial disability compensation is barred by § 417(2). Mr. A. responds by arguing that, because Barnard failed to adequately raise its §417 defenses in its answer, those defenses are waived.

As already discussed in the preceding section of this decision, § 417(1) establishes an affirmative defense to ongoing liability for medical care if the injured worker does not, for a period

of three years, 1) incur medical expenses reasonably related to the industrial accident and 2) submit the medical expenses incurred to the employee's employer or insurance carrier for payment. Similarly, § 417(2) provides an affirmative defense to claims for permanent partial disability compensation if no application for such compensation has been filed within six years from the date of the accident. But affirmative defenses are waived if not properly raised, and the Commission's Rule R602-2-1.D requires the employer or insurance carrier to state in their answers ". . . all affirmative defenses with sufficient accuracy and detail that an applicant may be fully informed of the nature of the defense asserted. . .."

In the previous part of this decision, the Appeals Board concluded that Quality had raised its §417(1) defense with sufficient accuracy and detail to satisfy Rule R602-2-1.D, in that Quality specifically cited the statute and also set out the factual basis for application of the statute. In contrast to Quality's specificity, Barnard's answer does not reference § 417, but instead refers in very broad terms to old and current versions of the entire Workers' Compensation Act and the entire Occupational Disease Act. Furthermore, Barnard's answer states no factual basis to support its § 417 defenses.

It bears repeating that the purpose behind Rule R602-2-1.D is to require parties relying on affirmative defenses to provide reasonable advance notice of those defenses so that the parties who must respond to those defenses have time to investigate the facts and present their evidence. Barnard's answer was too vague to meet either the spirit or the letter of the rule and, therefore, failed to preserve the § 417 defenses that would otherwise have been available to Barnard.

Barnard contends that, even if its answer was inadequate to raise its §417 defenses, it nevertheless proffered evidence during the evidentiary hearing that was sufficient to raise those defenses. The Appeals Board disagrees. Rule R602-2-1.D requires that affirmative defenses be raised in a party's answer, rather than at hearing. But assuming for discussion that the defenses can be presented for the first time at the evidentiary hearing, nothing in the proffer that Barnard made during the evidentiary hearing in this case can reasonably be viewed as raising Barnard's § 417 defenses.

Having concluded that Barnard waived its §417 defenses, the Appeals Board turns to Barnard's contention that a medical panel must be appointed to evaluate Mr. A.'s need for future medical treatment for the back injury in question. Barnard has not established any of the circumstances identified by Commission Rule R602-2-2 as justifying appointment of a medical panel. For that reason, the Appeals Board declines to require appointment of a medical panel.

Ameritemps' liability for permanent total disability compensation. Ameritemps contends it is not liable for Mr. A.'s permanent total disability compensation because the injury Mr. A. suffered while working for Ameritemps is not the cause of his inability to work. Mr. A.'s right to permanent total disability compensation is governed by § 34A-2-413(b) of the Act, as follows:

> To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of the evidence that:
>
> (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident . . . that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident . . . was the direct cause of the employee's permanent total disability.

Ameritemps concedes Mr. A. satisfies § 413(b)(ii)'s requirement that he is "permanently and totally disabled." Consequently, the Appeals Board turns to the two remaining requirements of § 413(b): subsection (i)'s requirement of a significant impairment resulting from the accident at Ameritemps that gives rise to the permanent total disability entitlement; and subsection (iii)'s requirement that the accident was the direct cause of Mr. A.'s permanent total disability.

The Appeals Board agrees with and adopts Judge La Jeunesse's reasoning on the two points in question. Mr. A.'s accident at Ameritemps on June 16, 1997, left him with a significant 4% whole person impairment and also contributed to his already-existing depression. Although Mr. A. had other work-related impairments, mental limitations and emotional difficulties before his accident at Ameritemps, he still had been able to work. After the numerous surgeries, additional impairment, and extended time away from the labor force that resulted from the Ameritemps accident, he was no longer able to work. The Appeals Board therefore agrees with Judge La Jeunesse that Mr. A. has established 1) a significant impairment resulting from the Ameritemps accident and 2) that the Ameritemps accident was the direct cause of his permanent total disability.

ORDER

The Appeals Board grants Quality's motion for review and hereby relieves Quality of liability for Mr. A.'s medical expenses by striking paragraph six of Judge La Jeunesse's "order," found at page 31 of Judge La Jeunesse's "Findings of Fact, Conclusions of Law and Order."

The Appeals Board affirms all other parts of Judge La Jeunesse's decision and denies the Motions for Review of Barnard and Ameritemps.

It is so ordered.

Dated this 3rd day of May, 2004.

Colleen S. Colton, Chair
Patricia S. Drawe
Joseph E. Hatch